CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

THE UNITED STATES CARTRIDGE COMPANY, a Corporation,
Petitioner,

vs.

R. M. POWELL et al.,
Respondents.

No. 685

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The United States Cartridge Company, a corporation, seeks to review the opinions and judgment of the United States Court of Appeals for the Eighth Circuit rendered and filed on October 26, 1950, and January 23, 1951, respectively, wherein said Court reversed the judgment of the United States District Court for the Eastern District of Missouri and remanded the cause for further proceedings consistent with said opinion filed October 26, 1950, as modified by the said opinion filed January 23, 1951.

I.

OPINIONS BELOW.

The opinions of the United States Court of Appeals for the Eighth Circuit are reported in 185 F. (2d) 67 and 186 F. (2d) 611.

II.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was brought by the fifty-nine plaintiffs to recover overtime compensation alleged to be due under the Fair Labor Standards Act for services rendered while they were employed, on a monthly salary basis and classified as exempt, in the Safety Department of the St. Louis Ordnance Plant, operated by petitioner, The United States Cartridge Company, for the United States Government, under a cost-plus-a-fixed-fee contract. It was tried by the District Court without a jury.

At the trial the Court and the parties were concerned, primarily, with two questions: First, the question as to the applicability of the Fair Labor Standards Act (which was ultimately decided by the Supreme Court, 339 U. S. 497), and, second, the question as to whether or not these plaintiffs were exempt employees under that Act. While the record is voluminous, by far the greater part of the evidence was directed to these two questions, and for present purposes may be completely disregarded. The only evidence which will require consideration here constitutes but a small portion of that contained in the record before the Court.

The several questions presented for consideration in connection with this petition for a writ of certiorari all arise

out of a single and rather narrow question presented to the Trial Court, which question, as will hereinafter appear, received but scant, if any, attention at the trial. That question was whether, under the terms of their contracts of employment, the fixed salaries paid to plaintiffs were understood and agreed by and between the employer and employees to be base pay for a forty hour week, as claimed by the plaintiffs, or base pay for a forty-eight hour week or an irregular or fluctuating week, as claimed by the defendant (petitioner).

The undisputed fact is, and several of the plaintiffs themselves so testified (R. 300-302, 332, 402), that during the entire time involved in this litigation the hourly-paid production employees worked on a three shift basis, eight hours per day (including a one-half hour lunch period), six days a week, Monday through Saturday, inclusive.

It is also an undisputed fact, and certain of the plaintiffs themselves so testified (R. 402, 451-452) that the plaintiffs, as Safety Engineers or Inspectors, were assigned to work along with the employees on the three production shifts, eight hours per day (except for a one-half hour lunch period), six days per week, and for a certain period of time were required to report one-half hour before the shifts of production workers (R. 620-627, 633, 634). The fact that the plaintiffs were assigned to work along with the shifts of production employees is further disclosed in plaintiffs' petition (R. 5), in the opening statement of plaintiffs' counsel (R. 56-57), in the written instructions issued to all of the plaintiffs (Plaintiffs' Exhibit F, R. 69), and in other portions of the testimony for plaintiffs (R. 113, 114, 183-184, 189, 214, 306, 314, 332, 385, 386, 402, 451).

It is also an undisputed fact, and certain of the plaintiffs themselves so testified, that they were subject to call twenty-four hours a day, seven days a week, in case of emergencies (R. 301, 332, 632, 682).

The only plaintiffs who testified with respect to the terms of their several contracts of employment admitted clearly and unequivocally that, at the time they were employed, they were told that they would be required to work, along with the regular shifts of production employees, eight hours a day, six days a week (or forty-eight hours a week), for which they would be paid fixed monthly salaries in agreed amounts. One of the plaintiffs testified that when he was employed he was told that "the basic work week was forty hours," but even he admitted that he had been told that the Government had requested that they work a six day week, that he would work six days a week for a fixed monthly salary.

Since this testimony is so brief, so significant, and, we believe, is controlling on the questions presented in this petition, we set forth the pertinent portions in toto:

Plaintiff Frank N. Harris testified on cross-examination as follows (R. 300):

> "Q. And what hours did Mr. Hartling tell you you were going to work? A. Mr. Hartling simply told me that I would be required to work around the clock. I mean by that, it was a three-shift basis.
>
> Q. In other words, you were told that you would be assigned to one of the three shifts? A. That is right.
>
> Q. The company was then on a three-shift basis? Working around the clock each day? A. That is right.
>
> Q. And there were certain men in the safety department assigned to each of those shifts? A. Correct.
>
> Q. And each shift worked normally eight hours a day, six days a week, did they not? A. Correct.
>
> Q. And you were told that your duties would be to work with the shift to which you were assigned? A. That is correct."

And again (R. 302):

"Q. And you knew each shift worked eight hours a day, six days a week, didn't you? A. That is right.

Q. And you were told you would be assigned to one of the shifts? A. Correct.

Q. And you would report a half hour before that shift started? A. I was told that the hours were from 7:30 until 4.

Q. And when you started to work you worked six days a week, didn't you? A. Yes, sir.

Q. Except for occasions when you should have been off you worked six days a week throughout the period of your employment in the safety department? A. Correct.

Q. Who told you what your salary was going to be? A. Strickland.

Q. And he told you your salary was going to be $200 a month? A. That is correct.

Q. What else did he say about your salary besides that? A. Nothing."

And again (R. 451):

"Q. I believe you testified when you were first employed as a safety engineer, you were instructed that you would report half an hour before the shift of the production employees and work to the end of that shift? A. That is correct."

Plaintiff Robert M. Powell testified on direct examination as follows (R. 315-316):

"Q. Was anything said about terms of employment? A. Yes, sir, Mr. Strickland said that I would start at a salary of $225 a month, and the basic work week was forty hours. However, the Government had requested we work a six-day week, and that is all that was said.

Q. Did he tell you the basic week was 40 hours? That is what I recall."

On cross-examination plaintiff Robert M. Powell further testified (R. 332):

"Q. When you were employed, were you employed to go to work on a day shift? A. I believe so. It was my understanding it was going to be all day work when I was employed.

Q. You were told you should report to work at 7:30 a. m.? A. That is correct.

Q. And that you would work until 4 o'clock p. m.? A. Yes, sir.

Q. That you would have a half hour off for lunch? A. Well, that wasn't brought out very clearly. I assume I had lunch time; that is correct.

Q. And you were told you would work six days a week? A. As I stated yesterday.

Q. I am asking you now, were you told that you would work six days a week from 7:30 in the morning until four in the afternoon? A. I was told the Government requested that we work six days a week.

Q. And therefore that you would work six days a week? A. Yes, sir.

Q. And you were told that your salary would be $225 per month to start? A. That is right.

(A paper is marked 'Defendant's Exhibit 7.')

Q. Mr. Powell, were you also told that in addition to those hours which I named that you might be subject to call in the event of emergencies beyond those hours? A. Yes, sir."

Plaintiff Arthur Clarence Kropp, who was first employed by the Company in a different job, on an hourly wage basis, testified on direct examination that there was nothing said about salary when he went to the Safety Department (R.

396). On cross-examination he testified (R. 401-403) as follows:

"Q. Mr. Kropp, you were originally hired at the St. Louis Ordnance Plant in September of 1941? A. That is right.

Q. As a trainee. And I (believed) you worked until some time in January of 1942 on various hourly pay jobs? A. Yes, sir.

Q. And during all of that time while you were on an hourly rate you were paid for all overtime that you worked in excess of forty hours per week? A. Yes, sir.

Q. And during all of that time you worked a 48-hour a week shift, is that correct? Or substantially all of the time? A. Yes, sir.

Mr. Bond: Your Honor, this is an awfully involved question.

A. I don't really remember whether I did or not.

Q. The plant was working three shifts a day, wasn't it? A. No, sir, not when I started.

Q. It was working three shifts a day while you were still on an hourly basis, wasn't it? A. No, sir.

Q. You were working eight-hour shifts six days a week? A. Yes, sir.

Q. And you worked eight-hour shifts six days a week during all the time you were on an hourly basis? A. No, sir, I was injured.

Q. While you were working then? A. While I was working, yes, sir.

* * * * * * *

Q. When you were transferred to be a safety inspector were you told that you would work on the same shift with the men that worked there? A. Yes, sir.

Q. And the same number of days? A. Yes, sir.

Q. When you say you were not told your hours you mean you were not told about reporting a half hour

ahead of the shift until—— A. I was told what time to report, but I don't know whether that was a half hour before the regular shift or not at that time.

Q. And you were not told that until a day or two or three after you started to work? A. No, sir.

Q. But you were told that you would work six days a week? A. Yes, sir, I was."

The admissions contained in such testimony were not, at any time, withdrawn, qualified, modified or explained; nor were they contradicted by the testimony of a single witness for either the plaintiffs or the defendant.

No plaintiff testified as to any agreement or understanding with anyone to the effect that his salary was to be compensation for a forty-hour week, and no other testimony was offered with respect to the circumstances under which the plaintiffs were severally employed or the negotiations, conversations or agreements as to the terms of such employment. In fact, no plaintiff other than the three who testified as set forth above testified on this subject at all. There being no contradiction and no conflict whatsoever in the oral testimony with respect to the terms of employment, such testimony should have been given the same force and effect as if there had been a written contract of employment.

Week after week, month after month, and year after year, the plaintiffs, as a group, actually worked (excluding, for a portion of the time, a one-half hour lunch period) eight hours a day, six days a week, an average of approximately forty-eight hours per week, except for occasional absences on the part of individual employees. For their services the plaintiffs were paid and they accepted, week after week, month after month, and year after year, checks computed, except as hereinafter noted, on the agreed monthly salary basis, regardless of the

actual number of hours worked (Plaintiffs' Exhibits A-1 to A-59, R. 120-147).

Admissions, as to the terms of their contracts of employment, having been drawn from the plaintiffs on cross-examination, the defendant not questioning but agreeing with the truth of such admissions, and no effort having been made on the part of the plaintiffs to withdraw, explain, qualify or modify such admissions, no further effort was made by the defendant to prove the truth of the facts so admitted. Nor, with but one exception, after these admissions had been made, was there any suggestion made at the trial, directly or indirectly, by any plaintiff, or by counsel for the plaintiffs, to the effect that such admissions were not true and correct. That one exception occurred near the end of the defendant's case, when counsel for plaintiffs, in cross-examination, attempted, in propounding a question to one of defendant's witnesses, to argue that the method of computing certain deductions shown on some of Plaintiffs' Exhibits, A-1 to A-59, indicated that the employee was on a 40-hour basis, but the Court sustained an objection thereto (R. 698). On the faith of such admissions by plaintiffs no evidence, oral or documentary, was deemed necessary, and none was offered by the defendant to corroborate them, and, in a sense, it can be said that the issue as to the terms of the plaintiffs' contracts of employment has not been tried.

The only evidence in the record relied upon to overcome the said admissions in the testimony of three of the plaintiffs themselves, and to support the judgment, was the following:

1. A few sentences contained in a booklet of some thirty odd pages setting forth general information with respect to the company's policies and procedures, a copy of which booklet was handed to each one of the thousands of em-

ployees (mostly hourly paid workers), including each of the plaintiffs, immediately after completion of the details of employment. This booklet was offered and received in evidence without any statement or suggestion on the part of plaintiffs' counsel that anything in it contradicted the admissions in the plaintiffs' testimony or that it had any bearing whatsoever upon this particular question. These sentences, in one edition of the booklet, read as follows (R. 206):

"Standard Hours of Work.

"There will be eight hours in any working day, and forty hours will constitute a working week. To meet the schedule required of us by the National Defense Program, it will be necessary to employ three shifts on production operations. When production demands require a longer work day, or longer work week, the Company will pay the legal overtime rate as provided under the Walsh-Healey Act, and the Fair Labor Standards Act. When three shifts are operating there will be rotation of the first, second and third shifts every two weeks. A lunch period will be allowed on each shift and will be paid for by the Company, that is, no deduction will be made for this lunch period.

"Payment of Overtime.

"Time and one-half will be paid in excess of eight hours per day or forty hours per week. Time and one-half also is paid for authorized work on Sunday and national holidays, except in departments or occupations where the established schedule requires seven days continuous operations. This means that overtime is paid for Sunday work and holidays on repair, maintenance, mechanical and new routine process operations, but not for work such as watching, plant protection, or continuous procedure operations. The

following national holidays: New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas, will be observed."

(Overtime was, of course, paid to all hourly paid workers for time worked in excess of forty hours per week.)

2. Plaintiffs' Exhibits A-1 to A-59 (R. 120-147) containing, inter alia, tabulations of the hours between clock rings shown on the time cards of the several plaintiffs, their monthly rates of pay, and the net amounts actually paid.

3. The testimony of two witnesses for the defendant, explanatory of certain isolated deductions from the fixed salaries shown on some of Plaintiffs' Exhibits, A-1 to A-59, which indicated that when certain of the plaintiffs, on occasions, worked less than forty hours per week, and their absences were not excused or approved, and deductions were made from their salary checks, such deductions being computed at the rate of 1/40th of the weekly pay for each hour less than forty not worked (R. 630-632, 693-694, 697, 698). The reasons for and circumstances under which such deductions were made was carefully brought out and was uncontradicted. Since the making of deductions, when they were made, began at the arbitrary figure of 40 hours, the computing of such deductions at the rate of 1/40th for each hour less than 40 worked has absolutely no significance; if they were not so computed, an employee doing no work at all might still be entitled to draw pay.

We believe that the preceding three paragraphs correctly indicate all of the evidence in the voluminous record relied on by plaintiffs (respondents) as supporting their contention that they were employed on a forty hour week basis and the judgment below. Since the record in this case is so voluminous, we feel confident that, in order to spare the Court the necessity of combing through the two extensive volumes, counsel for the respondents will point out to the

Court, specifically, such additional portions of the record, if any, as may be relied on as being contradictory to the admissions contained in the testimony of the plaintiffs themselves, and may have been inadvertently omitted from the above summary.

On the record thus presented, the District Court found (R. 918):

> "That the salaries paid to plaintiffs were base pay for a forty hour week, and plaintiffs are entitled to be compensated for all hours worked in excess thereof at one and one-half times the regular hourly rate, and that the proper method of computing the regular hourly rate is to divide the weekly wage by forty * * *"

made a similar Conclusion of Law (R. 919), and entered judgment accordingly for unpaid overtime compensation and liquidated damages aggregating $246,251.44 (R. 920-921), plus an attorney's fee of $24,625.00.

On appeal the Court of Appeals for the Eighth Circuit said, with respect to the appellant's (petitioner's) contention that the evidence shows that the basis of employment was a variable, or at least a forty-eight hour week, and that the above finding and conclusion of the trial court were erroneous (R. 1066):

> "It is true that there was a great deal of evidence in the record which tended to establish the conclusion that plaintiffs were employed on the basis of a variable or a 48-hour week. But, again, the evidence was contradictory and conflicting, and we are not at liberty to say under those circumstances that the trial court's finding was erroneous."

III.

QUESTIONS PRESENTED.

The following questions are presented for consideration in connection with this petition for a writ of certiorari:

1. To what extent are parties bound by admissions contained in their own testimony as to concrete facts, i. e., the terms of their several contracts of employment, not matters of opinion, estimate, appearance or inference, particularly when such admissions are not withdrawn, qualified, modified or explained, and are uncontradicted?

2. In determining the extent to which parties are bound by admissions in their own testimony with respect to the terms of their contracts of employment, made and to be performed in the State of Missouri, should the Federal Courts follow and be guided by the rule of decision in Missouri, the rule generally, or the rule in the Federal Courts, if there be any material difference in such rules?

3. May employees employed on a monthly salary basis, with full knowledge that they have been classified by the employer as exempt under the Fair Labor Standards Act and hence not entitled to overtime, who, month after month, and year after year, actually worked (excluding, for a portion of the time, a one-half hour lunch period) forty-eight hours per week, or a variable number of hours averaging approximately forty-eight hours per week, and who accepted over a period of months and years the fixed salary payments tendered by the employer as full compensation for their services rendered, thereafter contend that under the terms of their original contracts of employment such fixed salary payments were to represent compensation for a forty hour work week, with the right to overtime payments thereafter?

4. In determining the "regular rate of pay," within the meaning of the Fair Labor Standards Act, for salaried employees classified by the employer as exempt, who, at the time of their several employments, and at the times their initial monthly salaries were agreed upon, were told and fully understood that for such agreed monthly salaries they would be required to work on a forty-eight hour work week basis or on a fluctuating work week basis averaging approximately forty-eight hours, and who, week after week, month after month, and year after year, actually worked (excluding, for a portion of the time, a one-half hour lunch period) approximately forty-eight hours per week, and for such work were paid and accepted the salaries so agreed upon, as increased from time to time thereafter, may the Court divide such monthly salaries (converted to a weekly basis) by forty, instead of by forty-eight, or by the number of hours actually worked each week, and require the payment of overtime at one and one-half times the rate so determined for all hours in excess of forty per week?

5. In a case tried before the Court without a jury, where the evidence is both oral and documentary, but there is no conflict in the oral testimony, does the appellate court have the right to refuse to review the evidence and make its own findings as to the legal effect thereof?

IV.

STATUTE INVOLVED.

The statute involved is the **Fair Labor Standards Act, 29 U. S. C. A., Sections 201 to 219**, inclusive.

V.

JURISDICTION.

The original opinion of the United States Court of Appeals was rendered (R. 1059) and judgment filed on October 26, 1950 (R. 1073). The said judgment was vacated on November 20, 1950 (R. 1097). Thereafter, on December 1, 1950, the mandate of the Court of Appeals was issued to the District Court for the Eastern District of Missouri, pursuant to said opinion and judgment. On January 23, 1951, on motion of petitioner, the Court of Appeals filed its order and judgment recalling the said mandate, vacating, setting aside and holding for naught the said judgment entered November 20, 1950, filed its Opinion on Motion to Recall the Mandate and to Modify Opinion (R. 1113), and entered its order and judgment modifying the said opinion filed October 26, 1950 and entering a new judgment, providing for remand of the cause to the said District Court for further proceedings consistent with the said opinion filed October 26, 1950, as modified by the said opinion filed January 23, 1951, and directing that copy of said opinion filed October 26, 1950, as modified, and of the opinion filed January 23, 1951, would accompany the new mandate when issued to said District Court (R. 1120).

The jurisdiction of this Court is invoked under **Title 28, USC, Sections 1254 and 2101.**

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The effect of the decision of the United States Court of Appeals for the Eighth Circuit was to hold that the plaintiffs are not bound by the admissions in their own testimony with respect to the terms of their employment, even though such admissions were not changed, qualified, modified or explained away and were uncontradicted. In so holding, the Court of Appeals has not given proper effect

to an applicable decision of the Supreme Court, **McCrea v. United States, 294 U. S. 382, 79 L. Ed. 933, 55 S. Ct. 443**; has rendered a decision in conflict with decisions of other Circuit Courts of Appeals in the same matter, **Broad River Lumber Co. v. Middleby, 194 F. 817, 821 (4th Cir.), L. P. Larson, Jr., Co. v. Wm. Wrigley, Jr. Co., 253 F. 914, 918 (7th Cir.), cert. denied 248 U. S. 580; Massie v. Parker, 128 F. (2d) 99 (6th Cir.), Canadian Pacific Ry Co. v. Sullivan, 126 F. (2d) 433, 440 (1st Cir.), cert. denied 316 U. S. 696**; has decided an important question of local law in conflict with applicable local decisions, and has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision, **Steele v. Kansas City S. R. Co., 265 Mo. 97, 175 S. W. 177; Clapper v. Lakin, 343 Mo. 710, 123 S. W. (2d) 27; Hayes v. S. S. Kresge Co., 100 S. W. (2d) 325; Goggin v. Schoening, 199 S. W. (2d) 87, Annotation 169 A. L. R. pp. 798-826.**

2. The effect of the decision of the United States Court of Appeals for the Eighth Circuit was to hold that the plaintiffs, although they had been paid on a monthly salary basis, with full knowledge that they had been classified by the employer as exempt, and had, week after week, month after month, and year after year, actually worked (excluding, for a portion of the time, a one-half hour lunch period) forty-eight hours per week, or a variable number of hours aggregating approximately forty-eight hours, and had accepted, over periods of months and years, the fixed salary payments tendered by the company as full compensation for services rendered, could, nevertheless, contend and recover on the theory that under the terms of their original employment such fixed salary payments were to represent compensation for a forty hour work week, with the right to overtime payments thereafter. In so holding the Court of Appeals has not given proper effect to an applicable decision of this Court, **William v. Jacksonville Terminal Co., 315 U. S. 386**, and has rendered a de-

cision in conflict with the decisions of other Circuit Court of Appeals on the same matter, **Shepler v. Crucible Fuel Co., 140 F. (2d) 371, 373-374 (3rd Cir), Bergschneider v. Peabody Coal Co., 142 F. (2d) 784, 786 (7th Cir.), Lassiter v. Guy F. Atkinson Co., 162 F. (2d) 774, 776 (9th Cir.).**

3. The decision of the United States Court of Appeals for the Eighth Circuit, in affirming the finding and conclusion of the trial court that the proper method of computing the regular hourly rate was to divide the weekly wage by forty, and in failing to hold the same to be erroneous, has not given proper effect to applicable decisions of this Court. **Walling v. Helmerich & Payne, 323 U. S. 37, 40; United States v. Rosenwasser, 323 U. S. 360, 363; Overnight Motor Co. v. Missel, 316 U. S. 572; Walling v. Harnischfeger Co., 325 U. S. 427; Bay Ridge Operating Co., Inc., v. Aaron, 334 U. S. 446, 460-461, 464, 473-474, 476-477.**

4. The decision of the United States Court of Appeals for the Eighth Circuit that it was not at liberty to say that the trial court's finding that the salaries paid to plaintiffs were base pay for a forty-hour week was erroneous, has not given proper effect to applicable decisions of this Court, **United States v. Felin & Co., 334 U. S. 624, 639,** and **Baumgartner v. United States, 322 U. S. 665, 670-671;** and is in conflict with decisions of other Circuit Courts of Appeal on the same matter. **Orvis v. Higgins, 180 F. (2d) 537, 539 (2nd Cir.); Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F. (2d) 541, 548 (9th Cir.); Senato v. United States, 173 F. (2d) 493, 494 (2nd Cir.); Bach v. Friden Calculating Mach. Co., 155 F. (2d) 361, 364 (6th Cir.); Fleming v. Palmer, 123 F. (2d) 749, 751 (1st Cir.); Kaeser & Blair, Inc., v. Merchants' Ass'n, Inc., 64 F. (2d) 575, 576 (6th Cir.); Uihlein v. General Electric Co., 47 F. (2d) 997, 1003 (7th Cir.); Munro v. Smith 259 F. 1 (1st Cir.); Campbell Soup Co. v. Wentz, 172 F. (2d) 80, 82 (3rd Cir.); Flannery Bolt Co. v. Flannery, 86 F. (2d) 43 (3rd Cir.); American Nat. Bank v. Bartlett,**

40 F. (2d) 21, 22 (10th Cir.); Nashua Mfg. Co. v. Berenzweig, 39 F. (2d) 896, 897 (7th Cir.).

VII.

PRAYER FOR WRIT.

Wherefore, your petitioner, The United States Cartridge Company, a corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Eighth Circuit, and commanding that Court to certify and send to this Court for its determination, on a date certain to be therein named, a full and complete transcript of the record and of all of the proceedings in the case numbered on its docket 13663, and entitled "The United States Cartridge Company, a Corporation, Appellant, v. R. M. Powell et al., Appellees," and that the order and judgment of said United States Court of Appeals, in so far as it failed to find and determine that the finding and conclusion of the trial court that the salaries paid to the plaintiffs were base pay for a forty-hour week, and plaintiffs are entitled to be compensated for all hours worked in excess thereof at one and one-half times the regular hourly rate, and that the proper method of computing the regular hourly rate is to divide the weekly wage by forty were erroneous, be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

Respectfully submitted,

THE UNITED STATES CARTRIDGE COMPANY,

By ROBERT H. McROBERTS,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Its Attorney.

BRIEF

In Support of Petition for Writ of Certiorari.

I.

OPINIONS BELOW.

The opinions and decisions of the United States Court of Appeals for the Eighth Circuit were filed on October 26, 1950, and January 23, 1951, and are reported in 185 F. (2d) 67 and 186 F. (2d) 611, respectively. The judgment of the said Court of Appeals which was entered in conformity with the second of these opinions and decisions on January 23, 1951 (R. 1120), is not officially reported.

II.

JURISDICTION.

A statement of the grounds on which the jurisdiction of this Court is invoked is given in the petition (page 15) and, to avoid duplication, is not repeated.

III.

STATEMENT OF THE CASE.

A statement of the case has already been given in the petition (pages 2 to 12) and, to avoid duplication, is not repeated here.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The United States Court of Appeals for the Eighth Circuit erred in failing and refusing to hold that the Trial Court's Finding of Fact No. 10 was and is erroneous.

2. The United States Court of Appeals for the Eighth Circuit erred in failing and refusing to hold that the Trial Court's Conclusion of Law No. 4 was and is erroneous.

3. The United States Court of Appeals for the Eighth Circuit erred in failing and refusing to review the evidence with respect to the terms upon which plaintiffs were employed, and to make its own findings and conclusions as to the legal effect thereof.

V.

ARGUMENT.

I.

The Court of Appeals has overlooked and rendered a decision in conflict with the universally recognized rule that where a party, in his testimony, makes a material statement of fact, negativing his right of action or defense, and no more favorable evidence is offered to modify or contradict it, he is bound by such testimony, and this is particularly true when his testimony is equivalent to a judicial admission.

As pointed out in the petition, the only plaintiffs who testified with respect to the terms of their several contracts of employment admitted, clearly and without qualification, that, at the time they were employed, they were told that they would be required to work, along with the regular shifts of production employees, eight hours a day, six days a week (or forty-eight hours a week), for which they would be paid fixed monthly salaries in agreed amounts. Such testimony of the plaintiffs themselves was not withdrawn, qualified, modified or explained, nor is it contradicted by the testimony of a single witness for either the plaintiffs or the defendant. There being no contradiction of such oral testimony it should be considered as the equivalent of a written contract of employment.

No other plaintiff testified as to the terms of their original contracts of employment, and, indeed, as indicated in the opening statement of plaintiffs' counsel (R. 60), the theory upon which plaintiffs presented their case was that the evidence of these three plaintiffs would indicate the general features of the case, and that the others were similarly situated.

The Trial Court has ignored the admissions contained in this unqualified and uncontradicted testimony of three of the plaintiffs themselves. It has not only failed to hold that the plaintiffs as a group are bound by the admissions in this testimony offered on behalf of the group, but has even failed to hold that the three individual plaintiffs so testifying were bound by their own testimony.

The Court of Appeals has failed to hold that this decision of the District Court was erroneous. Although the Court of Appeals apparently had grave doubts about the correctness of the District Court's ruling, it failed to reverse it, on the assumption that it was not at liberty to do so.

In so holding the Court of Appeals has overlooked and rendered a decision in conflict with the universally recognized rule that where a party, in his testimony, makes a material statement of fact negativing his right of action or defense, and no more favorable evidence is offered to modify or contradict it, he is bound by such testimony, and this is particularly true when his testimony is equivalent to a judicial admission.

We find but one case in which the Supreme Court has had occasion to consider this particular question, namely, **McCrea v. United States, 294 U. S. 382, 383**, and in that case this Court merely applied the rule, without undertaking to state or explain the reasons for it. There the plaintiff, a sailor, had testified specifically as to the time when he had abandoned his vessel and that he did not in fact return. This Court said, l. c. 383, that it would "accept his testimony as correct," and refused to consider the effect of excerpts from the vessel's log, which appeared to support his claim and directly contradicted his oral testimony. In its ruling the Court of Appeals has failed to give proper effect to this decision.

Furthermore, the decision of the Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals in the same matter. Thus, in the case of **Broad River Lumber Co. v. Middleby, 194 F. 817,** which involved an issue as to the quantity of timber on certain land, the Fourth Circuit held, with respect to the defendant's testimony as to such timber, l. c. 821:

> "Inasmuch as this is the defendant's own testimony, it should be binding upon him as to the amount of timber within the definition fixed by this court, and, as the complainant failed to show exactly the amount within the definition, the court is of the opinion that it would be better at this stage of the cause to give a final decree based upon the evidence before it,"

and rendered judgment against the defendant accordingly.

In the case of **L. P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co., 253 F. 914, cert. denied 248 U. S. 580,** the Seventh Circuit made a similar ruling, saying, l. c. 918:

> "In a real and legitimate controversy, a party should be left within the knot of his averments in pleadings and admissions in testimony, unless the Court can find an absolute demonstration from other evidence in the case or from facts within judicial notice, like the laws of physics, etc., that under no circumstances could the averments and admissions be true."

And the Sixth Circuit Court of Appeals in the case of **Massie v. Parker, 128 F. (2d) 99,** has recognized this general rule, and has cited an earlier decision of the Eighth Circuit Court of Appeals as announcing such general rule, saying, l. c. 100:

> "It is conceded that the law of Kentucky does not differ from the general rule announced in State Farm Mutual Ins. Co. v. Bonacci, 8 Cir., 111 F. 2nd 412, 414,

419, that 'a party cannot, in his own case, be heard by a court to deny today what he solemnly swore was true on yesterday, without some explanation or excuse.' ''

In the case of **Canadian Pac. Ry. Co. v. Sullivan, 126 F. (2d) 433, cert. denied 316 U. S. 696,** the First Circuit stated and followed the rule but limited it to subjective matters.

Furthermore, in so holding, the Court of Appeals for the Eighth Circuit has decided an important question of local law, in conflict with applicable local decisions, and has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision. The Missouri rule with respect to the binding effect of a party's own testimony is somewhat more strict than that followed in some other jurisdictions, and is well settled by a long line of decisions. The case of **Steele v. Kansas City S. R. Co., 265 Mo. 97, 175 S. W. 177,** is a leading one on this question. There plaintiff testified to one set of facts on one day, but on the next day, without claiming oversight, inadvertence, misunderstanding, mistake or defective memory, testified to a diametrically different set of facts. Despite the contradiction, the Court held that the plaintiff was bound by his initial testimony, saying, l. c. 110:

"It is urged with much of ability and vehemence by learned counsel that the rule is that a plaintiff testifying for himself in his own sole suit is not so far concluded by his sworn testimony as to take from the jury the lawful right to weigh his conflicting statements and reconcile them and pass upon his credibility as they do that of other witnesses in the case. We concede that ordinarily a party is not absolutely concluded by his testimony in a case where subsequently upon some excuse of mistake, oversight, misunderstanding, or lack of definite recollection he de-

nies the statements forming the admissions. But so long as the admissions made by the party-witness stand they are conclusive and the adversary side may absolutely rely upon them."

l. c. 114-115:

"When a party litigant takes the stand as a witness for himself he ought to be permitted, and he is permitted, to protect himself from the human frailties of forgetfulness and mistake precisely as is any other witness. He ought not to be, and he is not, bound down by any cast-iron rule so that he is forever concluded by the least lapse of memory or oversight or mistake which may lead him by inadvertence to a misstatement of fact, which may, as a matter of law, destroy his case utterly. He may correct his errors and mistakes and lapses of memory and leave the jury on the whole case to pass upon his credibility. If he make no correction whatever, as we have seen, he is absolutely concluded and his adversary may with confidence rely upon the admissions made as conclusive against the maker thereof."

l. c. 118:

"Let it be borne in mind also that we are not dealing with the testimony of a witness in a case merely, but with that which is more than the utterances of a mere witness, viz., with a judicial admission, which always and until avoided by explanation, is prima-facie binding and conclusive."

In the present case the testimony of the plaintiffs to the effect that they were employed to work six days a week, eight hours per day, was never changed, modified, withdrawn or explained.

For further statements of the rule of decision in Missouri see **Clapper v. Lakin, 343 Mo. 710, 123 S. W. (2d)**

27; Hayes v. S. S. Kresge Co. (Mo. App.), 100 S. W. (2d) 325; Goggin v. Schoening, 199 S. W. (2d) 87; and the long line of Missouri cases cited in the annotation **169 A. L. R., pp. 816-820.**

A great many cases might be cited in which the Courts have enunciated and applied the general rule to the effect that a party testifying as a witness is bound by a material statement of fact negativing his right of action or defense when no more favorable testimony appears to contradict or modify it, but the following are, we believe, typical: **Tedder v. Home Ins. Co., 212 Ala. 624, 103 So. 674; Pepple v. Headrick, 64 Idaho 132, 128 P. (2d) 757; Bell v. Johnson, 142 Kan. 360, 46 P. (2d) 886; Perry v. Hanover, 314 Mass. 167, 50 N. E. (2d) 41; Roddy Mfg. Co. v. Dixon, 21 Tenn. App. 81, 105 S. W. (2d) 513; Daugherty v. Lady (Tex. Civ. App.), 73 S. W. 837.** The decision of the Court of Appeals is in conflict with and disregards the rule enunciated and applied in this line of cases.

Many cases, in many other jurisdictions, go further and hold that where a party testifies deliberately to a concrete fact, not a matter of opinion, estimate, appearance, inference or uncertain memory, but as a considered circumstance of the case, such testimony amounts to an informal judicial admission, and, in the absence of some explanation or withdrawal, is binding upon such party, even though other evidence is offered which tends to contradict such admission and to establish facts in the party's favor. Among the cases so holding are: **Gray v. Pankey, 211 Ala. 539, 100 So. 880; Edgecomb v. Callahan, 132 Cal. App. 248, 22 P. (2d) 521; Trombley v. Kolts, 29 Cal. App. (2d) 699, 85 P. (2d) 541; King v. Spencer, 115 Conn. 201, 161 A. 103; Kight v. American Eagle Fire Ins. Co., 125 Fla. 608, 170 So. 664; Tennes v. Tennes, 320 Ill. App. 19, 50 N. E. (2d) 132; Hinkson v. Morrison, 47 Iowa 167; Ort v. Allied Industries, 166 Kan. 487, 203 P. (2d) 234; Sutherland v. Davis, 286 Ky. 743, 151 S. W. (2d) 1021; Rappe v. Metro-**

politan Life Ins. Co., 332 Mass. 438, 77 N. E. (2d) 641; Christian v. Branstrom, 183 Mich. 143, 149 N. W. 1067; Sachs v. Karos, 310 Mich. 577, 17 N. W. (2d) 759, cert. denied, 326 U. S. 794; Vondrashek v. Dignan, 200 Minn. 530, 274 N. W. 609; White v. Brown Co., 85 N. H. 389, 159 A. 124; Mandell v. Dodge-Freedman Poultry Co., 94 N. H. 1, 45 A. (2d) 577; Kimmell v. Tipton (Tex. Civ. App.), 142 S. W. (2d) 421; Stanolind Oil & Gas Co. v. State (Tex.), 145 S. W. (2d) 569; Yellow Cab Co. v. Gulley, 169 Va. 611, 194 S. E. 683; Crew v. Nelson, 188 Va. 108, 49 S. E. (2d) 326; Wiley v. Rutland R. Co., 86 Vt. 504, 86 A. 808. The decision of the Court of Appeals is in conflict with and disregards the rule enunciated and applied in this line of cases.

Finally, there are many cases in many jurisdictions (including Missouri, as pointed out above) which go still further and hold that a party testifying in a law suit is bound by a definite statement of fact within his knowledge, whether objective or subjective, and as against not only his own conflicting testimony but that of his own witnesses, that of the other party's witnesses, and that of the other party himself. Some of the cases, outside of Missouri, so holding are: **Jacobs v. Cedar Rapids, 181 Iowa 407, 164 N. W. 891; Harlow v. Leclair, 82 N. H. 506, 136 A. 128; Sarkise v. Boston & M. R. Co., 88 N. H. 178, 186 A. 332; Wristen v. Wristen (Tex. Civ. App.), 119 S. W. (2d) 1104; Massie v. Firmstone, 134 Va. 450, 114 S. E. 652; South Hill Motor Co. v. Gordon, 172 Va. 193, 200 S. E. 637; Steele v. Central of Georgia R. Co., 123 Ga. 237, 51 S. E. 438; Cullen v. Peschel, 115 Mont. 187, 142 P. (2d) 559; Fowler v. Pleasant Valley Coal Co., 16 Utah 348, 52 P. 594; Germaine v. Boston & A. R. Co., 298 Mass. 501, 11 N. E. (2d) 447.** The decision of the Court of Appeals is in conflict with and disregards the rule enunciated and applied in this line of cases.

The effect of this error upon the size of the judgment below is twofold and substantial. In the first place, when

the weekly pay is divided by 40 instead of 48, the resulting regular rate of pay so found is increased by 20%. In the second place, if the salaries paid to the plaintiffs represented base pay for at least a 48 hour work week, then the plaintiffs have already been paid straight time for the 8 hours over 40, and are entitled, at the most, to additional pay for such hours at only one-half (instead of one and one-half) times their regular rate of pay. **Bay Ridge Operating Co., Inc., v. Aaron, 334 U. S. 446, 476-477.** On the basis of an even 48 hour week, the effect of this error is to make the judgment 3.6 times the amount it should otherwise be. Thus, on this ground alone, the judgment below in the present case is excessive by $177,848.26, without regard to its effect as a precedent upon the numerous other similar cases arising out of the operation of this same plant and now pending in the District Court.

II.

The decision of the Court of Appeals for the Eighth Circuit has not given proper effect to a decision of the Supreme Court, and is in conflict with decisions of other Circuit Courts of Appeals holding that continuance in an employment under a new method of computing pay creates a new contract.

As heretofore pointed out, pages 9 to 11, plaintiffs seek to overcome the effect of the testimony with respect to the terms of their contracts of employment by relying upon some statements in a booklet (Plaintiffs' Exhibits C-1, C-2, C-3 and C-4, R. 189-213) handed to each employee immediately after completion of the details of employment.

But even if we assume that the plaintiffs at the time they received such booklets were justified in construing, and did construe, the language contained therein as an agreement on the part of the company that, despite what

they had just been told by the persons employing them, they were to be paid overtime for all hours in excess of 40, plaintiffs cannot now recover upon any such theory. Regardless of what they may have assumed when they received such booklet, the undisputed fact remains that week after week, month after month, and year after year, the plaintiffs actually worked an average of approximately 48 hours per week, and accepted, over periods of months and years, the fixed salary payments tendered by the company as full compensation for services rendered. Accordingly, no matter what may have been assumed by the plaintiffs initially, by continuing in their employment under the circumstances outlined a new contract of employment was created by which plaintiffs are bound. This has been expressly held by the Supreme Court in the case of **Williams v. Jacksonville Terminal Co., 315 U. S. 386, 398**, and the decision of the Court of Appeals has not given proper effect to such decision.

The decision of the Court of Appeals is likewise in conflict with the decisions of other Circuit Courts of Appeals on the same matter, such as the decision of the Third Circuit Court of Appeals in the case of **Shepler v. Crucible Fuel Co., 140 F. (2d) 371**, where the Court enunciated and applied the same rule, despite evidence of repeated protests by the employees, saying, l. c. 373:

> "There is evidence to the effect that during this period the plaintiffs made a number of protests about the new arrangement—that it was not 'correct', that it was not 'according to the Wage and Hour Law,' and that under the law they were entitled to a higher base rate than was allowed. The Court did not find this to be a fact, but had such a finding been made it would not have helped the plaintiffs in view of their continuance in their employment with full knowledge of the rate and method of computation of their pay."

And again, l. c. 374:

> "Adverting to the evidence of protest on the part of the plaintiff. In Williams v. Jacksonville Terminal Co., 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914, the Court held, we think broadly and unequivocally, that continuance in an employment under a new method of computing pay creates a new contract and that the employee's consent to the new arrangement may be found from the continuance, notwithstanding repeated protests on his part."

The decision is likewise in conflict with the decision of the Seventh Circuit Court of Appeals in the case of **Bergschneider v. Peabody Coal Co., 142 F. (2d) 784**, where the Court held, under somewhat similar circumstances, l. c. 786:

> "With full knowledge of the terms of that offer, the plaintiff accepted the work and received the pay earned in accordance with the offer. This created a contract of employment between the parties. Williams v. Jacksonville Terminal Co., 315 U. S. 386, 398, 62 S. Ct. 659, 86 L. Ed. 914."

Also, the decision is in conflict with that of the Ninth Circuit in the case of **Lassiter v. Guy F. Atkinson Co., 162 F. (2d) 774**, where the Court held, l. c. 776:

> "True the employment arrangements here were not negotiated agreements, but they nevertheless amounted to contracts since the employees were advised of them and continued to work without complaint. Shepler v. Crucible Fuel Co., 3 Cir., 140 F. (2d) 371; Williams v. Jacksonville Terminal Co., 315 U. S. 386, 398, 62 S. Ct. 659, 86 L. Ed. 914."

No matter what the plaintiffs may have read into the language in the booklet, Plaintiffs' Exhibits C-1, C-2, C-3, and C-4, given to them when they were first employed, the fact that, as conclusively shown by Plaintiffs' Exhibits

A-1 to A-59 (R. 120-147), they continued in the employment and accepted the fixed salaries paid them as full compensation for whatever number of hours they actually worked, is binding upon them. They cannot now be heard to say that the method and rate of compensation was something other than that which they accepted regularly and consistently over such long periods of time.

III.

The decision of the Court of Appeals for the Eighth Circuit fails to give proper effect to decisions of the Supreme Court holding that the regular rate of pay, for the purpose of computing overtime under the Fair Labor Standards Act, is to be found by dividing the weekly compensation by the hours worked.

If the plaintiffs were actually employed on the basis of fixed salaries as agreed compensation for a work week of 48 hours, or a variable work week averaging 48 hours, as certain of the plaintiffs admitted under oath, then the decision of the Trial Court, upheld by the Court of Appeals, that the proper method of computing their regular rate of pay is to divide the weekly wage by 40 is erroneous in another respect, and fails to give proper effect to a number of decisions of the Supreme Court.

Among such decisions is the case of **Bay Ridge Operating Co. v. Aaron, 334 U. S. 446,** where this Court held, l. c. 464:

> "that Congress intended the regular rate of pay to be found by dividing the weekly compensation by the hours worked."

And, again, l. c. 473-474:

> "As an employment contract for irregular hours the rule of dividing the weekly wage by the number of

hours worked to find the regular rate of pay would apply."

The earliest of this line of decisions of the Supreme Court is that in the case of **Overnight Motor Transportation Co., Inc., v. Missel, 316 U. S. 572,** where the Court said, l. c. 580, footnote:

"Wage divided by hours equals regular rate."

Again, in the case of **Walling v. Helmerich & Payne, 323 U. S. 37,** the Supreme Court held, l. c. 40:

"While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime work week. Overnight Motor Co. v. Missel, supra. To compute this regular rate of respondent's employees, assuming the same wages and tours, required only the simple process of dividing the wage received for each tour by the number of hours in that tour."

To the same effect see **United States v. Rosenwasser, 323 U. S. 360, 363,** and **Walling v. Harnischfeger Corp., 325 U. S. 427.**

The plaintiffs having admitted that their fixed salaries were compensation for a work week of 48 hours, or a variable work week averaging at least that many hours, and having regularly and consistently accepted over periods of months and years fixed salaries as full compensation for the hours actually worked, their regular rate of pay should have been determined by dividing the amounts paid by the hours worked, instead of by the wholly fictitious figure of 40. In failing to correct the error in this respect, the Court of Appeals failed to give effect to the decisions of the Supreme Court which have clearly and unequivocally announced the rule which should have been followed.

IV.

The decision of the Court of Appeals for the Eighth Circuit has not given proper effect to decisions of the Supreme Court, and is in conflict with decisions of other Circuit Courts of Appeals holding that where a Trial Judge's finding rests exclusively upon undisputed facts and written evidence, so that his evaluation of credibility has no significance, an Appellate Court is not only at liberty, but is in duty bound, to review the evidence and arrive at its own conclusion as to the effect thereof.

The Court of Appeals said that "the evidence (with respect to the terms of plaintiffs' employment) was contradictory and conflicting, and we are not at liberty to say under those circumstances that the trial court's finding was erroneous."

As we have already pointed out above, when the evidence on this point is examined, it is clear that it was not contradictory and not conflicting. But even if there were any contradiction or conflict in such evidence as a whole, the fact remains that there was no contradiction and no conflict whatsoever in the oral testimony. Plaintiffs themselves testified as to the terms of their employment. No witness for either side contradicted or denied their testimony. Your petitioner developed this testimony on cross-examination and accepts and has always accepted it as true and correct. If there was any contradiction or conflict, it was only between the undisputed oral testimony of the plaintiffs and certain documentary evidence (Plaintiffs' Exhibits C-1, C-2, C-3 and C-4, and A-1 to A-59, inc.).

Since there was and is no dispute as to what was said to the plaintiffs at the time they were employed, no denial

of the fact that each of the plaintiffs received a copy of the booklet when the details of their employment were completed, and no controversy as to the amounts paid to and accepted by plaintiffs in payment for their services over varying periods of months and years, the ultimate question as to whether or not such payments were compensation for a forty-eight hour work week or variable work week, or, instead, for a forty hour work week, is a question of law, or, at the most, a mixed question of law and fact.

In holding that it was not at liberty to answer this question for itself, the Court of Appeals has failed to give proper effect to the decision of the Supreme Court in the case of **United States v. Felin & Co., 334 U. S. 624,** where the Court said, l. c. 639:

> "There are facts and facts, even in Court of Claims' litigation. It is the function of the Court of Claims to make findings. But when a judgment based on such findings is here brought in question it is the function of this Court to ascertain the meaning of the findings in order to determine their legal significance. The judgment of the court below that 'replacement cost' is the proper measure of just compensation and the mode by which it reached the amount of that cost are inescapably enmeshed in considerations that are clearly familiar issues of law and particularly of constitutional law. Where the conclusion is a 'composite of fact and law,' Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 668, this Court may certainly hold that as a matter of law the findings are erroneous. See, e. g., Washington ex rel. Oregon R. & N. Co. v. Fairchild, 224 U. S. 510, 528."

Likewise the Court of Appeals failed to give proper effect to the decision of the Supreme Court in the case of **Baumgartner v. United States, 322 U. S. 665, 670-671.**

Furthermore, in holding that it was not at liberty to review such uncontradicted oral testimony and such documentary evidence and make its own determination as to the effect thereof, the Court of Appeals for the Eighth Circuit rendered a decision in conflict with (a) a line of decisions of other Circuit Courts of Appeals on the same matter holding that where the trial judge's finding must rest exclusively upon undisputed facts and written evidence, so that his evaluation of credibility has no significance, the Appellate Court is at liberty to disregard such finding and make its own, and (b) other decisions of other Courts of Appeals which go further and hold that, under such circumstances, the Appellate Court not only may, but **must**, review the evidence and arrive at its own conclusion as to the effect thereof.

A recent decision in the first line of cases is that in the case of **Orvis v. Higgins, 180 F. (2d) 537**, the Second Circuit Court of Appeals held, l. c. 539:

> "Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance."

Likewise, in the case of **Senato v. United States, 173 F. (2d) 493**, the Second Circuit Court of Appeals made a similar ruling, saying, l. c. 494:

"As there is no issue dependent upon the credibility of any witness, we are, therefore, in as good a position as was the trial judge to determine the meaning and legal effect of the evidence and to direct judgment accordingly. United States v. United States Gypsum Co., 333 U. S. 364, 394, 395, 68 S. Ct. 525; Stubbs v. Fulton Nat. Bank, 5 Cir., 146 F. 2d 558; Kuhn v. Princess Lida of Thurn & Taxis, 3 Cir., 119 F. 2d 704."

To the same effect see the cases of **Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F. (2d) 541, 548, 9th Cir.; Home Indemnity Co. v. Standard Accident Ins. Co., 167 F. (2d) 919, 923, 9th Cir.; Bach v. Friden Calculating Mach. Co., 155 F. (2d) 361, 364, 6th Cir.; Fleming v. Palmer, 123 F. (2d) 749, 751, 1st Cir.; Uihlein v. General Electric Co., 47 F. (2d) 997, 1003, 7th Cir.,** and **American Nat. Bank v. Bartlett, 40 F. (2d) 21, 10th Cir.**

As for the second line of cases, the case of **Munro v. Smith, 259 F. 1, 1st Circuit,** is perhaps typical. That case involved a charge of fraud, and the Court, after pointing out the admission of performance of practically all of the substantive acts stated in the bill, said, l. c. 2-3:

"The case must turn upon the admitted facts, the inferences therefrom, and upon the interpretation of written evidence, in considering which, of course, the District Court had no substantial advantage over this court. The usual rule of giving great weight to the conclusions of the trial judge who observed the appearance and the manner of the witnesses is not, therefore, to any substantial degree, applicable in this case."

Among other decisions to the same effect are the following: **Campbell Soup Co. v. Wentz, 172 F. (2d) 80, 82 (3rd Cir.); Flannery Bolt Co. v. Flannery, 86 F. (2d) 43 (3rd Cir.); Kaeser & Blair, Inc., v. Merchants' Ass'n, Inc., 64 F.**

(2d) 575 (4th Cir.); Nashua Mfg. Co. v. Berenzweig, 39 F. (2d) 896, 897 (7th Cir.).

There being no contradiction and no conflict whatsoever in the oral testimony, it should have been given the same force and effect as a written contract of employment. The Court of Appeals being in as good a position as was the Trial Judge to consider such uncontradicted oral testimony (equivalent to a written contract of employment), together with the written evidence, it follows that the Court of Appeals should have reviewed such evidence and have arrived at its own conclusion as to the meaning and effect thereof.

CONCLUSION.

There is, we believe, something more than just money involved in this case, although the $177,848.26 by which the judgment is excessive (solely by reason of the error herein complained of) is no trifling sum.

Likewise, there is something more than a mere technical question of law involved, although it would appear that there are ample technical grounds for the granting of the writ.

There is something repugnant to our sense of justice, something wholly contrary to our concept as to the accepted and usual course of judicial proceedings, in the spectacle here presented. The plaintiffs have, through their designated representatives, admitted under oath the terms of their contracts of employment. They have week after week, month after month, and year after year, accepted payment in accordance with such contracts of employment. And yet, in the very Court, and in the very proceeding, in which the admissions were made, they have sought, until now successfully, to repudiate such admissions and to recover a judgment in a grossly excessive amount, upon a theory which is directly contrary to the facts which they

have solemnly admitted. We submit that, above and beyond all financial and technical grounds, the avoidance of such a result constitutes a special and important reason for the Supreme Court, in the exercise of its sound judicial discretion, to grant this petition for a writ of certiorari.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

THE UNITED STATES CARTRIDGE COMPANY, a Corporation, (Defendant) Petitioner, vs. R. M. POWELL et al., (Plaintiffs) Respondents.	No. 685.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The findings of fact, conclusions of law and judgment of the District Court for the Eastern District of Missouri in favor of plaintiffs appear at pages 916 to 922 of the record. The opinions of the Court of Appeals for the Eighth Circuit affirming the District Court's findings and remanding the case for further hearing and findings under the Portal Act are reported in 185 Fed. (2) 67, and 186 Fed. (2d) 611. The particular ruling, here involved, is Point 3 of the opinion rendered October 26, 1950 (R. 1065, 1066) (185 Fed. [2], l. c. 71).

JURISDICTION.

Jurisdiction is invoked under Title 28 U. S. C. A., Secs. 1254 and 2101. Our position that no ground exists for the exercise of that jurisdiction is stated infra in the argument herein.

STATUTE INVOLVED.

Petitioner cites the Fair Labor Standards Act, 29 U. S. C. A., Secs. 201 to 219, inclusive, but neither its validity nor construction is involved herein.

QUESTIONS PRESENTED.

This case does not turn on the abstract and involved propositions listed as questions by petitioner herein. The determination of the Application for Certiorari herein requires the consideration of but two questions:

1. Was the finding of the District Court that plaintiffs' salaries were base pay for a forty hour week supported by evidence?

2. Should this Court review the appraisal by the Courts below of the evidence supporting that finding?

STATEMENT.

Defendant's summary statement is not a fair presentation of the matter involved. The suggestion in the opening paragraphs that the issue here in question was overshadowed by other issues, or that it received slight consideration is particularly incorrect. The complaint charges that plaintiffs were employed "at agreed salaries for a 40 hour week" (R. 5), and that the salary of each plaintiff was "base pay" for a 40 hour week (R. 7-29) Plaintiffs' proof met this issue completely. It was thoroughly tried, briefed and the evidence carefully appraised by both Courts below. The finding of the District Court (R. 918, Parg. 10) was unanimously affirmed by all the seven Judges of the Eighth Circuit Court of Appeals and is amply supported by the evidence.

The computation of these overtime claims was made on payroll information furnished by defendant in the form of summaries which it prepared from its records, and which were offered in evidence as Plaintiffs' Exhibits A-1 to A-59 (R. 120). To avoid burdening the record with these voluminous tabulations we stipulated in the Court of Appeals that only five need be printed (R. pp. 977-8). These five are typical of the whole series and they are reproduced in photostat form (R. pp. 120-147). These exhibits show the name and badge number of each plaintiff, the date his employment commenced and terminated, the pay periods that he worked, the total actual hours with which he was credited, his monthly salary, and his weekly or two-weekly wage, the deductions made including amounts he was docked for absence, and the net amount paid.

Salary workers are included within the benefits of the Fair Labor Standards Act, and in order to compute overtime due them, their salaries must be translated into an hourly rate (U. S. v. Rosenwasser, 323 U. S. 364). This is

a mere matter of mathematics. The first step is to translate the monthly salary into a weekly wage, to-wit: Multiply the salary by 12 (the number of months) and divide the result by 52 (the number of weeks) (U. S. v. Townsley, 323 U. S. 557). Defendant, itself, so computed the weekly wage of all plaintiffs in the summaries it prepared (Plaintiffs' Exhibits A-1 to A-59). For example, note the first item in Exhibit A-1 (Record p. 121): Powell received a salary of $225 per month, which, multiplied by 12, equals $2,700 per year, which, divided by 52 equals $51.92, the exact amount shown by defendant on Plaintiffs' Exhibit A-1 as Powell's gross wages for his first pay period, to-wit: The week 11/8/42 to 11/15/42. The above is typical of defendant's computation of the weekly wage of all plaintiffs.

The next step is to convert the weekly wage into an hourly rate. This we did by dividing the weekly wage by 40 (the number of hours in the standard work week), and we so computed the hourly rate of each plaintiff in this case (see Plaintiffs' Exhibits B-1 to B-59, R. p. 120 and R. pp. 149-181).

As an illustration, and again using Powell as an example, note the first item in Exhibit B-1 (R. p. 149). The weekly wage $51.92 is divided by 40 and the quotient obtained is $1.29-4/5. Resolving this odd fraction of a cent into the nearest whole, we obtain $1.30 as the regular hourly rate (Exhibit B-1, column 3, Record p. 149).

For the first week Powell worked 43 5/10 hours according to his time as reported by defendant (Exhibit B-1, column 2-a, R. p. 149). Multiplying the excess, 3½ hours by $1.95 (1½ times the regular hourly rate), the result is $6.82, which figure we place in Exhibit B-1, column 6, as the overtime due on the hours credited to Powell by defendant. To this we add in column 7 an additional one-

half hour per day, being the lunch period, during the period we contend it was improperly deducted (R. pp. 184-5, R. 690-693). The sum of columns 6 and 7 constitutes the overtime compensation due Powell, to-wit: $1,232.46 (R. p. 153).

The above is typical of the method whereby the claims of all plaintiffs were computed.

In the case of this B series of exhibits, as in the case of the A series, we stipulated that only five need be printed and photostats will be found in the record (pp. 149 to 181). It is, however, stipulated that all the judgments of the District Court (R. pp. 921 and 922), before the addition of liquidated damages, correspond with the claims as thus computed (R. p. 978). The whole series of Exhibits A-1 to A-59 and B-1 to B-59 are in the record as lodged in the court below, and the stipulation (R. p. 978) permits a reference to the whole series if deemed necessary.

The evidence that the salaries paid these plaintiffs were base pay for a 40-hour week and that therefore the regular hourly rate must be computed on the basis of a 40-hour week is, in substance, as follows:

These 59 plaintiffs, all of whom have been found to be similarly situated (Finding of Fact No. 4, R. 917) were employed at regular salaries for the standard work week of 40 hours.

Plaintiff Powell testified (R. pp. 315, 316) that he was employed at a salary of $225 per month for a basic work week of 40 hours, to-wit:

> "Q. Exhibit A shows that you were employed to commence November 2, 1942, and terminated March 31, 1944. Is that correct? A. That is correct.
>
> Q. Where did you go to get your job out there? A. I went direct to the Administration Building on Goodfellow Avenue and talked to Mr. Strickland.

Q. And tell us what occurred between you and Mr. Strickland. A. Mr. Strickland asked me if I had ever had any experience in safety work before, and I told him I had been. And then he said, 'Well, we will give you a little training by putting you on with one of the other safety inspectors a few days before we can turn you over to a unit of your own.' So I went around with another safety inspector for about three days before they gave me a unit of my own.

Q. Was anything said about terms of employment? A. Yes, sir; Mr. Strickland said that I would start at a salary of $225 a month, and the basic work week was 40 hours. However, the Government had requested we work a six-day week, and that is all that was said.

Q. Did he tell you the basic week was 40 hours? A. That is what I recall.

Q. Did you get one of those booklets that I have introduced in evidence? A. Yes, sir, I did."

No witness for the defendant denied this testimony.

The booklet referred to is Plaintiffs' Exhibits C-1, C-2, C-3 and C-4, entitled "Your Job With the St. Louis Ordnance Plant." It starts with a "foreword" admonishing every employee to read "this booklet describing the Company's policy and procedure." The foreword further emphasizes that every regular employee "should re-read this booklet from time to time," and that any employee who cannot subscribe to the principles outlined in the booklet "should not accept a job with the St. Louis Ordnance Plant." The representations contained in this booklet were part of the contract of employment. The portions pertaining to the standard hours of work and that "forty hours will constitute a working week," were read into the record (R. 188, 189) and are reproduced in full (R. p. 206) as follows:

"Standard Hours of Work.

"There will be eight hours in any working day, and forty hours will constitute a working week. To meet the schedule required of us by the National Defense Program, it will be necessary to employ three shifts on production operations. When production demands require a longer work day, or longer work week, the Company will pay the legal overtime rate as provided under the Walsh-Healy Act, and the Fair Labor Standards Act. When three shifts are operating there will be rotation of the first, second and third shifts every two weeks. A lunch period will be allowed on each shift and will be paid for by the Company, that is, no deduction will be made for this lunch period.

"Payment of Overtime.

"Time and one-half will be paid in excess of eight hours per day or forty hours per week. * * *"

This statement of policy expressly declares that eight hours shall be a working day and forty hours a working week, and expressly obligates the Company to pay for hours in excess thereof as provided under the Fair Labor Standards Act. It is an explicit admission by defendant that the regular work week was to be forty hours and if longer hours were required overtime would be paid and all hours in excess of forty would be paid for at time and one-half. Production demands did require working these employees long hours in excess of forty and they are entitled to be compensated for those excess hours in accordance with the above agreement, and the declared policy of the Company.

Defendant confirms the above statement of its policy by its own computations (Plaintiffs' Exhibits A-1 to A-59). An examination of this series of exhibits will show that

whenever a plaintiff failed to put in forty hours and a deduction was made, it was computed on the basis of a forty hour week. Using Plaintiffs' Exhibit A-1, Record, p. 121, as an example, an examination of this exhibit will show that for the work week ending March 7, 1943, Powell worked 24 9/10 hours, being 15 1/10 hours short of 40. His weekly wage was 51.92 and he was paid only $32.33, being a deduction of $19.60. If you multiply 15 1/10, the number of hours he was absent, by $1.30, the hourly rate computed on a 40 hour week, the result is $19.63, approximately the amount deducted. The slight difference of 3¢ is obviously due to the fact that the hourly rate exactly computed is $1.29 4/5. In our computations we resolved the odd fraction to the nearest whole, using $1.30 as the regular hourly rate. For the next week ending March 14, 1943, Powell worked 38 9/10 hours, 1 and 1/10 short of 40, for which he was docked $1.43, which is exactly the hourly rate of $1.30 multiplied by 1 1/10. For the week ending June 3, 1943, Powell worked 39 9/10 hours, 1/10 short of 40. He was docked 13¢, which is exactly 1/10 of $1.30, the regular hourly rate computed on the basis of a 40 hour week. These are merely typical instances (R. bottom pp. 186, 187, 188). Hundreds of similar examples appear in these 59 exhibits, all of which were prepared by defendant, and in which in every instance defendant computed the hourly rate on the basis of a forty hour week, just exactly as the plaintiffs contend for herein, and just exactly as plaintiffs computed it in their series of exhibits, B-1 to B-59.

J. L. Kelley, defendant's payroll supervisor and defendant's witness, who prepared the Exhibits A-1 to A-59, testified that in making the deductions shown in these exhibits he followed the policy that if a salaried employee was working on a 40 hour week, he made deductions for absenteeism based on 40 hours (R. 693):

"Q. Assuming that he didn't ask to have his absenteeism approved and his supervisor didn't approve it and it was a case where you were going to dock him, how did you figure deduction? That is what I want to know. A. It depended on the shift and his work week. If he was working on a 48-hour week, he was deducted on the basis of 48 hours; if he was working on a 40-hour week, it was deducted on that basis."

and (R. 697):

"Q. Now then, in taking an employee where he didn't work 40 hours a week, in cases where you did make the deduction, what method did you follow in computing the deduction to pay him on the basis of his work week? A. If he was working a 40-hour week we deducted on the basis of 40 hours; or if he was working a 48-hour or a 44-hour week.

Q. And you only deducted on the basis of a 40-hour work week where the employee was working on 40 hours? A. **Where he was scheduled to.**" (Emphasis ours here and elsewhere.)

We submit that it is a necessary inference that since its own exhibits show that in all cases defendant made deductions from plaintiffs' pay on the basis of a 40-hour week, it follows that defendant regarded plaintiffs' standard work week as 40 hours.

Further, Harry P. Miller, defendant's Personnel Director, and defendant's witness, speaking of the time cards and the pencil computations thereon said (R. 630):

"Q. (Mr. McRoberts) Do you know what the policy of the company was in requiring these to be kept, and what they were kept for? A. Yes, sir.

* * * * * * *

Q. Now, Mr. Miller, for what other purpose were those records kept and used? A. Well, they were

kept for this reason: Any employee working less than **the regular time of 40 hours per week** could do one of two things: with the approval of his supervisor he might be paid for any time lost due to illness or any other reason, which is approved, and that was set up by the use of a special form for that purpose. In other words, the employee could apply for pay during sickness or absence. Employees signed it and submitted it to their immediate superior who also signed it, if he so approved, and then forwarded it to the management for approval and payment by the payroll department.

Q. Then do I understand that if an employee, according to these records, was shown to have put in less than 40 hours in any particular week, there would be a deduction from his salary for that week? A. Unless the employee asked for payment, submitted the reason and had it approved by his superior and the management."

Note that Mr. Miller used the expression "the regular time of 40 hours per week", just as the defendant corporation in its Statement of Policy to Its Employees (Plaintiffs' Exhibit C-3, R. 206) used the expression "and 40 hours will constitute a working week," and that if a longer work week was required "the Company will pay the regular overtime rate." These are clearly admissions that the regular work week was 40 hours, and that any time in excess thereof was overtime. The whole question was one of fact, and the evidence supports the Trial Court's finding.

Plaintiffs never accepted their pay checks as compensation for the overtime hours worked. Plaintiffs' testimony proves conclusively that they objected and made individual and organized protest both about their classification and defendant's refusal to pay overtime. Plaintiff Harris testified that he protested to Mr. Strickland (R.

303); that he discussed it with his superiors (R. 304), to whom he made complaint (R. 305); and that he called at the Wage and Hour Bureau, and that he consistently made complaints in respect to the payments he was receiving (R. Top p. 306), to-wit:

> "Q. During all of that time had you made a complaint about the payments you received? A. Yes, sir, I had."

Plaintiff Harris further testified that as a result of dissatisfaction among the Safety Engineers a mass meeting was held, attended by the Director, and "which was attended by all members of the Department" (R. 452). This meeting is more fully described in plaintiffs' counter-affidavits in opposition to defendant's motion for a new trial (R. 952). None of the above testimony was denied.

It is obvious that under the facts and circumstances of this case continued employment could not be acquiescence in a variable hourly basis of computation or a forty-eight hourly basis, **because no such was in use.** Defendant itself used the forty hour standard for determining the hourly rate. The estoppel in this case works just the other way. Since defendant in charging these plaintiffs for absence invariably computed the regular rate for the purpose of the deduction on the basis of a forty hour week, it cannot complain if overtime is credited to these plaintiffs by the same method of computation.

The extracts from the testimony of certain plaintiffs quoted by defendant-petitioner prove nothing more than that plaintiffs were required to work more than the regular "forty hours" that "constituted a working week" and were not paid for it, and that they consistently protested the nonpayment. There was at that time no dispute as to the computation of the hourly rate. Defendant invariably computed the regular rate on the same basis on which these claims are computed.

The cases cited by defendant on acquiescence in a new contract by continued employment do not relate to comparable situations. Shepler v. Crucible Fuel Co., 140 Fed. (2) 371, is further distinguishable in that the Court stressed the fact (syl. 2) that the employees in question had "full knowledge of the rate **and computation of their pay.**" These plaintiffs never had any knowledge that their rate of pay was being computed on any other basis than a forty hour week. They could not have had any such knowledge because the evidence recited above proves that it was not the fact (see above testimony of J. L. Kelley).

ARGUMENT.

I.

Where the employee is hired on a fixed weekly salary for a work week of a fixed number of hours, his regular rate of pay is determined by dividing the agreed weekly compensation by the fixed number of hours.

U. S. v. Townsley, 323 U. S. 557, 65 S. Ct. 413, 89 L. Ed. 454, Syl. 5, l. c. 464;

Walling v. Helmerich & Payne, Inc., 323 U. S. 37, 65 S. Ct. 11, 89 L. Ed. 29, Syl. 3, and l. c. 33, and Annotation, 89 L. Ed., p. 59;

Mabee v. White Plains Pub. Co., 41 N. Y. Supp. (2d) 534, Syl. 14, l. c. 541, Parg. 14 (180 Misc. 8);

Emerson v. Mary Lincoln Candies, Inc., 20 N. Y. Supp. (2d) 570;

Kappler v. Republic Pictures Corp., 59 Fed. Supp. 112, l. c. 117;

Landreth v. Ford, Bacon & Davis, Inc., 147 Fed. (2d) 446, Syl. 2, l. c. 148, Pargs. 1-3 (8th Cir.);

Interpretative Bulletin, Wage and Hour Division, January, 1950, Part. 778, Sec. 778.3 (b) (4).

The above authorities fully support the trial court's conclusion of law that the salaries paid plaintiffs were payment for a forty-hour week (Conclusion of Law 4, R. p. 919).

The decision of this Court in United States v. Townsley, 89 L. Ed. 454, Syl. 5, l. c. 464, 323 U. S. 557, 65 Sup. Ct. 413, is directly in point. This was a suit for overtime compensation by a government employee whose salary was fixed on a monthly basis. The action was brought under Section 23 of the Independent Office Appropriation Act of 1935, 5 U. S. C. A., Pocket Part, p. 243, Section 673 (c), which provided (Townsley case, l. c. 457):

> "That the regular hours of labor shall not be more than forty per week and all overtime shall be compensated for at the rate of not less than time and one-half * * * the respondent's normal work week consisted of six eight-hour days."

After Townsley's employment had terminated he brought suit under the above Act which is couched in almost identical language as Section 7 (a) of the Fair Labor Standards Act to recover time and a half for all hours he had worked in excess of forty per week. He was held entitled to recover and his compensation computed as follows (Syl. 5), to-wit:

Multiply the monthly pay by 12, divide the result by 52 to obtain the weekly salary; divide this by 5 to obtain the rate per an 8-hour day. In approving this method of computing the overtime the Supreme Court said (89 L. Ed., l. c. 464):

> "The Court below approved the respondent's method of reckoning and we think its decision correct. After the adoption of Section 23 the respondent was in effect hired for a work week of forty hours, or a five-day week, and his daily wage was to be determined on that basis. He has not been paid for the sixth day of each week and should recover straight time and one-half for the sixth day."

In so ruling the Supreme Court referred to its earlier decision in Walling v. Helmerich & Payne, Inc., 89 L. Ed. 29, Syl. 3, and l. c. 33 (323 U. S. 37, 65 S. Ct. 11). Syl. 3 is as follows: "The words 'regular rate' as employed in the provisions of Section 7a of the Fair Labor Standards Act * * * requiring employees working in excess of forty hours a week to be compensated at a rate not less than one and one-half times the regular rate, obviously mean the hourly rate actually paid for the **normal non-overtime work week.**" And again at page 33 the Court said: "While the words 'regular rate' are not defined in the Act, they obvi-

ously mean the hourly rate actually paid for the **normal non-overtime work week.**"

See also decision of the District Court for the Southern District of Iowa in which the Townsley case, supra, is cited as authority for the proposition that where the agreed work week is forty hours the employee is entitled to straight time and one-half for all overtime. Kappler v. Republic Pictures Corp., 59 F. S. 112, Syl. 12, l. c. 117, where the Court said:

> "but if his 'regular rate' is based upon an agreed forty hours a week rate then he is entitled to straight time and one-half overtime. U. S. v. Townsley, 65 Sup. Ct. 413."

The administrative ruling of the Wage and Hour Division is in accordance with the above authorities. Interpretative Bulletin, January, 1950, supra, Sec. 778.3 (b) (4):

> "(4) Salaried employees—General.—If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of $40, and if it is understood that this salary is compensation for a regular work week of 35 hours, the employee's regular rate of pay is $40 divided by 35 hours, or $1.14 an hour, and when he works overtime he is entitled to receive $1.14 for each of the first 40 hours and $1.71 (one and one-half times $1.14) for each hour thereafter. If an employee is hired at a salary of $40 for a 40-hour week his regular rate is $1 an hour."

In the Annotation to Walling v. Helmerich & Payne, Inc., supra, 89 L. Ed. 59, authorities are cited in support of the proposition that "where contract provides for a specified number of working hours" the regular rate "is determined

by dividing the total weekly compensation by the number of working hours agreed upon in the contract," and this is true **irrespective** of the actual hours worked each week. Mabee v. White Plains Pub. Co., 41 N. Y. Supp. (2d) 534, and Emerson v. Mary Lincoln Candies, Inc., 20 N. Y. Supp. (2d) 570.

We bespeak the Court's consideration of Mabee v. White Plains Pub. Co., as the decision is directly in point. In that case after the N. R. A. came into existence the newspaper was reorganized on a forty hour week basis, which continued in effect all times thereafter. Summing up the testimony the Court said (l. c. 541):

> "The entire newspaper was reorganized on a forty hour a week basis; the work week of each employee was definitely forty hours; the basic week of each employee, including the newsman, was forty hours a week, and that basic forty hour week was in effect at all times since 1933."

It was then held, that irrespective of the number of hours that the employee actually worked, whether that be more or less than forty hours, his hourly rate was the weekly salary divided by forty, to-wit, if his salary was $40 per week his regular rate was $1 per hour.

On the record in the case at bar there can be no question of the fact that defendant's plant was organized and operated on a forty hour week. Its statement of labor policy expressly so declared (See Plffs' Ex. C-3, R. 206). Employees of plaintiffs' group were so instructed (Testimony of Powell, R. 316), and the regular rate of this particular group of employees was regularly so computed by defendant's own payroll supervisor (Testimony of James L. Kelley, defendant's witness, R. 684 to 698, and particularly pp. 693 and 697). And Mr. Harry P. Miller, Personnel Director, and defendant's witness, used the expression "the

regular time of forty hours per week" as descriptive of the work week at the plant.

We submit, therefore, that the conclusion of the District Court, affirmed by the Appellate Court, that the salaries paid these plaintiffs were base pay for a forty hour week is correct, and in conformity with the decisions of this Court, and with the decisions of the circuits.

II.

The record presents no reason worthy of consideration for granting certiorari on defendant's petition.

This Court has said that jurisdiction to bring up cases on certiorari from the Courts of Appeal was conferred on it for two purposes: (1) to secure uniformity of decision among the circuits, and (2) to bring up questions of importance which it is in the public interest to have decided by this Court. The jurisdiction is not conferred merely to give the defeated parties another hearing. Magnum Import Co. v. Coty, 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922; Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387, 43 S. Ct. 422, 67 L. Ed. 712, l. c. 714.

This Court has admonished the Bar that it will not interfere with a judgment of the Court of Appeals if the conclusion of that Court "depends on appreciation of circumstances which admit of different interpretations." Federal Trade Commission v. American Tobacco Co., 274 U. S. 43, 47 S. Ct. 667, 71 L. Ed. 1193-4. There the decision rested on a question of fact: Did the American Tobacco Company become a party to an unlawful combination? Pointing out that "this matter of fact is of no general importance," 71 L. Ed., l. c. 1194, this Court declined to decide it. In Delaney v. U. S., 263 U. S. 586, 68 L. Ed. 462, syl. 2, l. c. 465, this Court pointed out

(middle of first column) that it takes "something more than ingenious criticism" to overthrow a judgment in this court on the ground that it is not supported by the testimony, when that judgment has been approved by both the District Court and the Court of Appeals.

More recently in Wilkerson v. McCarthy, 336 U. S. 53, 93 L. Ed. 497 the concurring opinion of Justice Frankfurter, with whom Justice Burton concurred, expressed the view, l. c. 506-7, that certiorari should not have been granted since it appeared that the case turned on a mere "appraisal of evidence," and that certiorari should be dismissed even after having been granted when it was revealed "that the case involved no more than its particular facts."

And so here, if as we believe, this record contains substantial support for the District Court's finding (R. 918, par. 10), then no other conclusion of law is possible than the one made by the District Court (R. 919, par. 4). No conflict with the decisions of this Court or with the circuits is presented. The case involves only its particular facts. No question of general or public importance is involved, and we submit that the defendant's petition for certiorari should be denied.

CONCLUSION.

The procedure antedating this application gives it somewhat the appearance of an afterthought. When the ruling complained of was made last October (R. 1059-1065) and became final on the denial of defendant's motion for rehearing last November (R. 1097-8-9), no attempt at certiorari was made. After the mandate went down and the District Court was proceeding to final hearing to make the further findings under the Portal Act ordered by the Court of Appeals, this defendant, on December 29, 1950,

moved to recall the mandate, not for certiorari, but for clarification of the opinion on a point not here involved (R. 1100-07). The modification was granted (R. 1113-21), and seizing on the fact that it was accomplished by vacation and re-entry of judgment instead of by mere modification, defendant claims an additional ninety days from January 23, 1951, and filed this application here April 21, 1951, more than six months after the ruling complained of was made. Whatever may have been the purpose of all this, the fact remains that the effect has been to delay final disposition of this case which has already been in the courts more than six years. The final hearing was last set in the District Court April 23rd last, and while the stay granted by the Court of Appeals had long since expired, we did not press the matter out of deference to this Court, and Judge Moore passed the hearing until July 9th next. It is hoped by that time there will be no impediment in the way of a conclusion of this case. After all there is some reason behind the ancient belief that it is in the public interest that litigation end.

Believing that no ground for certiorari exists, we ask that the petition be denied.

Respectfully submitted,

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